THE PUBLIC AND CONSTITUTIONAL MORALITY CONUNDRUM: A CASE-NOTE ON THE *NAZ FOUNDATION* JUDGMENT

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*The paper discusses the role public morality has played in developing the fundamental rights jurisprudence in India. Restriction of fundamental rights has been justified on the basis of the doctrine of compelling state interest. The author argues that reading public morality into the ground of compelling state interest may make fundamental rights susceptible to the personal interpretations of judges or considerations of a politically motivated legislature. However, the present case makes an interesting point by indicating that public morality and constitutional morality diverge at some points, and that regulation of public morality, unless it overlaps with constitutional morality, would not constitute compelling state interest to curb fundamental rights. The author opines that the new test of constitutional morality used in the case may be subject to more determinable standards than the prior one. Further, to support his stance on non-interference by the state in relation to issues comprising purely of public morality, the author states that regulating homosexuality would amount to the regulation of external preferences by the State, and an enforcement of the majority's moral convictions by the State without an assessment of the actual threat to public order if the morality of the majority was not imposed on the remaining population, which is not warranted either under Dworkin's or Rawls' theories respectively.***

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** Abstract supplied by Editors.

I. INTRODUCTION

The discussion in *Naz Foundation v. Govt. of NCT*[1] (*hereinafter* "*Naz Foundation*") *begins* with a reference to the impact that the *Maneka Gandhi* judgment[2] had on the evolution of Article 21 and fundamental rights in general. In *Maneka Gandhi*, it may be recalled, the Supreme Court had acknowledged the interplay between different fundamental rights as expounded in *R.C. Cooper v. Union of India*[3], and perfected it into the clichéd interplay between the *trinity* of Articles 14, 19 and 21.[4] The rest, as they say, is history. This Article focuses on an aspect of *Naz Foundation* that may perhaps be of similar jurisprudential significance as *Maneka Gandhi* itself.

II. THE REJECTION OF PUBLIC MORALITY AS A VALID JUSTIFICATION TO TRAMPLE INDIVIDUAL RIGHTS

While considering the constitutionality of Section 377 of the Indian Penal Code (*hereinafter* "IPC"), 1860[5], the Delhi High Court was confronted with an argument of the Union of India[6] that *Indian society is yet to demonstrate readiness or willingness to show greater tolerance to practices of homosexuality.* Thus, it was contended that *law cannot run separately from the society since it only reflects the perception of the society.*

Before dealing with this argument, the Court embarked on a discussion of the concepts of 'personal liberty' and 'privacy' under Article 21, and concluded that Section 377 IPC denies a person's dignity and criminalises his or her core

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1 (2009) 160 DLT 277; W.P. (C) No.7455/2001 of 2009 (Delhi HC).

2 Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

3 (1970) 1 SCC 248.

4 This article does not examine the distinction between the right to freedom under Article 19 and personal liberty under Article 21 on the one hand, and the right to equality under Article 14 on the other as the ground for justifying decriminalization of sodomy laws. This is because the *Maneka Gandhi* judgment established a link between the three, and therefore, the distinction may not be relevant in the Indian context. In other jurisdictions, however, significant importance has been given to this distinction. It is argued that arguments justifying decriminalization of homosexuality on the basis of right to privacy or personal liberty are not effectively able to answer the public morality argument, while justifications based on the right to equality are. *See e.g.*, Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 15 GEO L.J. 1871 (1997).

5 § 377 reads: "*Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine*."

6 As represented by the Ministry of Home Affairs. This is significant because the Union of India was also represented by the Ministry of Health and Family Welfare, which, rather curiously, took a completely contradictory stand to that of the Ministry of Home Affairs.

identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. Having stated that, the Court related the legal analysis at hand to the judgment in *Gobind* v. *State of M.P.*[7], which held that "fundamental rights explicitly guaranteed to a citizen have penumbral zones" and that "fundamental right must be subject to restriction on the basis of compelling public interest."[8]

The *Gobind* test, described as the 'compelling *state* interest' test in *Naz Foundation*, became the touchstone on which the Court drew a distinction between '*public morality*' and 'constitutional morality'. It rejected the Union of India's argument and held that: [9]

> "[E]nforcement of public morality does not amount to a 'compelling state interest' to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others.
> ....
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> [P]opular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality."

The complete rejection of 'public morality' as a possible justification on the ground that it is based on shifting and subjective notions of right and wrong is the most significant aspect of this Judgment, as it seemingly marks a divergence from the prior line of reasoning on the importance of public morality. However, this writer contends that *Naz Foundation* does not reject the concept of public morality *per se*, but rather, it fine-tunes it to develop a constitutional morality.

III. THE IMPORTANCE OF PUBLIC MORALITY IN SHAPING FUNDAMENTAL RIGHTS

The notion of 'public morality' has long informed and shaped the contours of various fundamental rights.

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[7] (1975) 2 SCC 148.

[8] *Id.*, ¶ 31. It is interesting to see that in *Gobind*, the Court wanted to place a restriction on fundamental rights by subjecting them to a compelling state interest. In *Naz Foundation*, however, this test is used in the converse manner, to hold that fundamental rights cannot be encroached upon except for a compelling state interest.

[9] *Supra* note 1, ¶ 75, 79.

In *State of Bombay v. R.M.D. Chamarbaugwala*[10], the Supreme Court was confronted with an argument that the right to carry out gambling transactions forms part of the fundamental right under Article 19(1)(g) of the Constitution. The argument of the petitioners was that the words 'trade or business' in Article 19(1)(g) had to be read to be of widest amplitude. It was urged that "the proper approach to the task of construction of these provisions…is to start with absolute freedom and then to permit the State to cut it down, if necessary, by restrictions which may even extend to total prohibition."

The Apex Court promptly rejected the argument. It relied on the ancient deprecation of gambling as a vice,[11] and its unfavoured treatment in different foreign jurisdictions to hold that gambling activities were *res extra commercium* and did not fall within the ambit of the term 'trade or business'. In the ultimate analysis, it was the widespread public and legal opinion classifying gambling as a vice that led to this conclusion.

In *K.A. Abbas* v. *Union of India*[12] (*hereinafter* K A Abbas), the Supreme Court was asked to rule on the constitutionality of pre-censorship of films, etc. in the backdrop of Article 19(1)(a) and 19(2). Article 19(2), it may be noted, specifically lists 'public order, decency or morality' as one of the interests for which reasonable restrictions can be imposed on the freedom of speech and expression.

Apart from this being a case where the Court uncharacteristically[13] embarked on an academic question,[14] the Hon'ble Court held that:[15]

> "[C]ensorship of films, their classification according to age groups and their suitability for unrestricted exhibition with or without excisions is regarded as a valid exercise of power in the

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[10] AIR 1957 SC 699.

[11] Including, by reference to the Mahabharata.

[12] (1970) 2 SCC 780.

[13] The Supreme Court has time and again refused to decide issues that have been rendered academic. *See, e.g.*, Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi, 1987 (Supp) SCC 93; Sanjeev Coke Manufacturing Company v. Bharat Coking Coal Ltd., (1983) 1 SCC 147; R.S. Nayak v. A.R. Antulay, (1984) 2 SCC 183 and Arnit Das v. State of Bihar, (2001) 7 SCC 657.

[14] The question in the present case was perhaps academic because the Government had decided to grant a "U" certificate to the petitioner's film, which was his prayer in the petition as originally framed. The petitioner then sought to amend his petition, so as to be able to challenge pre-censorship itself as offensive to freedom of speech and expression and alternatively the provisions of the Act and the rules, orders and directions under the Act, as vague, arbitrary and indefinite. This was permitted by the Hon'ble Court because "the petitioner was right in contending that a person who invests his capital in promoting or producing a film must have clear guidance in advance in the matter of censorship of films even if the law of pre-censorship be not violative of the fundamental right."

[15] *Supra* note 13, ¶ 41.

> interests of public morality, decency etc. This is not to be construed as necessarily offending the freedom of speech and expression…This is because the social interest of the people overrides individual freedom. Whether we regard the state as the *parens patriae* or as guardian and promoter of general welfare, we have to concede, that these restraints on liberty may be justified by their absolute necessity and clear purpose. Social interests take in not only the interests of the community but also individual interests which cannot be ignored. A balance has therefore to be struck between the rival claims by reconciling them. The larger interests of the community require the formulation of policies and regulations to combat dishonesty, corruption, gambling, vice and other things of immoral tendency and things which affect the security of the State and the preservation of public order and tranquillity.
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> On the lines of the *Chamarbaugwala* decision, the Supreme Court in *Nashirwar* v. *State of M.P.*[16] affirmed the power of the State to regulate or even completely prohibit the sale of liquor. At its root, it was stated, lies "public expediency and public morality". This view that trade in obnoxious materials such as liquor, etc. is *res extra commercium* was also approved by the Majority in *State of Punjab* v. *Devans Modern Breweries Ltd.*[17]"

In *Mr. 'X'* v. *Hospital 'Z'*[18], 'public morality' was treated as the factor that would help determine the precedence of one competing fundamental right over another.

The point of delving into these decisions is to highlight the central role that 'public morality' has played in defining the content of fundamental rights. It follows that 'public morality' is not a justification that can be summarily rejected merely on the ground that it is based on shifting and subjective notions of right and wrong. In our system of Government, the legislature being an elected body is deemed to represent the aspirations and values of its constituencies. This *deeming fiction* cannot be allowed to be questioned on empirical grounds for else the logical sequitur would be that the authority of the judiciary and indeed of the Constitution itself would be open to question, leading to total chaos and anarchy.

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[16] (1975) 1 SCC 29.

[17] (2004) 11 SCC 26. However, the dissenting opinions of Justice B.N. Agarwal and Justice S.B. Sinha have given a severe beating to this long held notion.

[18] (1998) 8 SCC 296.

IV. THE TRADITIONAL METHOD OF SOLVING THE CONFLICT BETWEEN INDIVIDUAL RIGHTS AND PUBLIC MORALITY

Having thus acknowledged the importance of 'public morality', can it then be placed at the opposite end of the spectrum, justifying any encroachment on individual rights as was sought to be argued by the Union of India in *Naz Foundation*?

The traditional answer of the Courts to this problem has been to devise the *balancing act*. An example of this can be found in *K.A. Abbas* referred to above, where the Court held that restraints on individual liberty can be justified by their absolute necessity and their clear purpose. Even the *Gobind* test adopted by the High Court in *Naz Foundation* is to similar effect, namely, that fundamental rights have to pave way for compelling public interests.

V. THE UNIQUENESS OF THE *NAZ FOUNDATION* FORMULATION: CONSTITUTIONAL MORALITY

The beauty of *Naz Foundation*, and this is the central thrust of this Article, is that it goes a step further in terms of jurisprudential analysis. The problem with the *balancing act* is two-fold – *first*, it does not sufficiently define a compelling public or state interest, and *second*, the lack of definition tends to leave the elected representatives as the best judges of compelling public interests. Therefore, in the absence of a definition based on some principle, the judicial determination of whether a particular public interest would override individual liberty would invariably come down to the idiosyncrasies of the presiding Judge(s). A Judge personally moved by the nature of infringement in question would invariably conclude that no compelling public interest exists, while one not so moved would defer to the judgment of the elected representatives as the custodians of public interest.

Naz Foundation marks the first leap at taking us out of this conundrum. By rejecting public morality as a compelling state interest that could justify restraint of personal liberty, the High Court places public morality in direct contrast to constitutional morality, which it describes as being based on constitutional values. But how far constitutional values are themselves based on or shaped by public morality is something that the High Court does not delve into.

The essence of the distinction between public and constitutional morality is that public morality is merely a reflection of the moral and normative values of the majority of the population (as expressed by the legislature), while Constitutional morality not only reflects the majority's values, but also shapes and changes them as part of the social engineering aspect of our Constitution. Thus formulated, it follows that public morality and constitutional morality are not mutually exclusive, but only have significant departure points. An example of a point of departure between the two can be seen as the prohibition of untouchability, or the more general prohibition of

discrimination on the ground of caste, religion, etc. On the other hand, the two can be seen to converge in the treatment of gambling as *res extra commercium*.[19]

Viewed from this perspective, the judgments referred to in Part II may be considered to be authorities on the importance of public morality *only* in so far as it converges with constitutional morality. Or simply put, as authorities for considering the particular aspect of public morality as being in consonance with constitutional morality.

This distinction between public and constitutional morality, as vague as it may be, is still more scientific than the *balancing act,* which leaves you at the mercy of the idiosyncrasies of the particular Judge, or the judgment of the legislature, which acts more in terms of political considerations than on the basis of sound principles. And this is precisely where the Constitutional importance of *Naz Foundation* lies.

VI. IDENTIFYING THE DIVERGING POINT BETWEEN CONSTITUTIONAL AND PUBLIC MORALITY

The entire discussion on the relationship between public and constitutional morality begs one important question – On what basis can one identify the diverging point between Constitutional and public morality? Or is it possible to arrive at such a theoretical basis at all? Is there a principled basis to see whether or not an Act of legislature that encroaches on individual rights is a valid manifestation of a compelling public interest?

In *A Theory of Justice*[20], John Rawls argues that:[21]

> "Liberty of conscience is limited, everyone agrees, by the common interest in public order and security… Given the principles of justice, the state must be understood as the association consisting of equal citizens. It… regulates individuals' pursuit of their moral and spiritual interests in accordance with principles to which they themselves would agree in an initial situation of equality…Therefore the notion of the omnicompetent laicist state is also denied, *since from the principles of justice it follows that*

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[19] It is possible to argue that the deprecation of gambling may not be a part of public morality at all, judging by the sheer numbers that engage in it. It is important in this regard to bear in mind that actual engagement in gambling is not necessarily reflective of the thought process of the actor with respect to its moral correctness. In any case, its adverse impact on the actor's family places the issue beyond the moral convictions of the actor.

[20] JOHN RAWLS, A THEORY OF JUSTICE (2000).

[21] *Id.,* 212, 213.

> *government has neither the right nor the duty to do what it or a majority (or whatever) wants to do in questions of morals and religion.* Its duty is limited to underwriting the conditions of equal moral and religious liberty."

Granting all this, it now seems evident that, in limiting liberty by reference to the common interest in public order and security, the government acts on a principle that would be chosen in the original position. For in this position each recognizes that the disruption of these conditions is a danger for the liberty of all...

Furthermore, *liberty of conscience is to be limited only when there is a reasonable expectation that not doing so will damage the public order which the government should maintain. This expectation must be based on evidence and ways of reasoning acceptable to all.*

Thus, Rawls' conception of the role of the State[22] provides a principled basis for distinguishing between what kind of interests the State can or cannot protect. The importance of Rawls' formulation to our present discussion is that he does not envisage the enforcement of morals of the majority to be a duty or a right of the State. Even though he concedes that individual liberty can be compromised in the interest of public order or security, there are two vital caveats – (a) that the danger to public order must be based on evidence and (b) it must be based on ways of reasoning acceptable to all. Under this hypothesis, Section 377 of the Indian Penal Code would not stand the compelling state interest test, as the majority's moral convictions cannot by themselves be treated as valid public interests in the absence of a consequential threat to public order that is over and above the immorality.

In *Taking Rights Seriously*, Ronald Dworkin makes a principled argument in favour of decriminalization of homosexuality. He puts forth a distinction between personal and external preferences – personal preferences being for a person's own enjoyment of some goods or opportunities, while external preferences being for the assignment of goods or opportunities to others.[23] Simply put, my personal preferences are about what I myself shall do or have, and my external preferences are about what other people should do or have.

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[22] Based in his 'original position' where the State acts as an agent of the citizens.

[23] He says, "I wish now to propose the following general theory of rights. The concept of an individual political right . . . is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals." *See generally* John Hart Ely, *Professor Dworkin's External/Personal Preference Distinction*, (1983) DUKE L.J. 959.

Dworkin's argument is that a political decision cannot take into count external preferences. For example, the fact that the majority of personal preferences favour a sports stadium rather than an opera house counts as an argument for the stadium. But, on the other hand, the fact that the majority regard homosexuality as immoral does not count as an argument for legislating against homosexuality because the preferences here are external ones.[24]

The importance of Dworkin's hypothesis lies in the distinction between personal and external preferences, and how the proper role of the State can only be to take decisions based on personal preferences. This distinction is crucial, and appears to provide a principled basis for distinguishing between instances of public morality that deserve protection at the cost of individual liberties and those that do not.

Subject to their own criticism as they are,[25] these theories offer a scientific system for arriving at a conclusion regarding the validity of an Act trampling on individual liberty in the name of public morality.

VII. CONCLUSION

It is this writer's argument that *Naz Foundation* is in fact a step in this direction of identifying a principled basis for distinguishing between different kinds of morality. Nobody can argue that criminal law has no role to play in regulating individual liberty in order to protect public morality. The IPC is replete with offences that are fundamentally grounded in the protection of public morality. The offence of bigamy, for instance, is rationalized as involving an "*outrage on public decency and morals*"[26]. To treat *Naz Foundation's* rejection of public morality as a violation of this principle is to misunderstand the essence of *Naz Foundation*.

Naz Foundation's distinction between public and constitutional morality is nothing but a distinction between morality that is in consonance with the values of the Constitution, and morality that is not. The essence of Rawls' or Dworkin's arguments is also on similar lines, i.e. State action for protection of public morality must show that it falls within the permitted sphere of activity of the State, which the criminalization of homosexuality does not.

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[24] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, 358 as cited in Chin Liew Ten, *Mill on Liberty*, available at http://www.victorianweb.org/philosophy/mill/ten/ch2e.html (Last visited on September 8, 2009).

[25] *See* H.L.A. Hart, *Between Utility and Rights*, 79 COLUMBIA L. REV. 828 (1979); *See also* AMARTYA SEN, THE IDEA OF JUSTICE (2009).

[26] Per Cockburn, C.J. in R v. Allen, (1872) LR 1 CCR 367, 374-75, as cited in J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW, 666 (1983).

The most important observation in *Naz Foundation* in the context of gay rights is when it declares that the Constitution of India recognizes, protects and celebrates diversity. This takes the debate on gay rights beyond the *tolerance* paradigm, and brings it into the *acceptance* realm, laying the ground-work for further grant of equal rights to the gay community, all on the foundation stone of our newly discovered constitutional morality.